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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 19

HAROLD FAHY,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

BRIEF OF THE RESPONDENT

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To be argued by:
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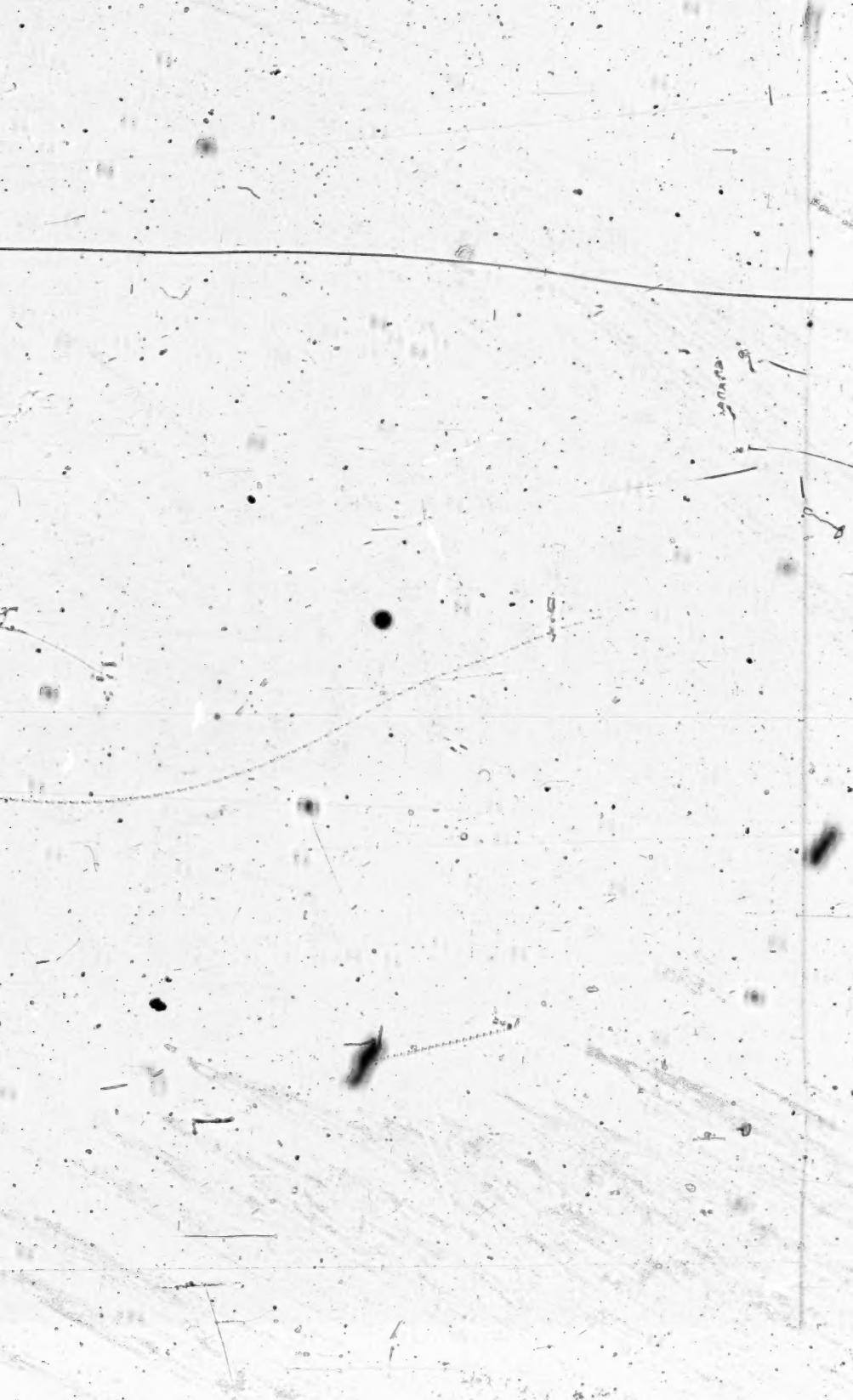

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Question Presented

In a State case tried one year prior to the *Mapp* case but not decided by the Appellate Court until one year after *Mapp* and wherein evidence seized without a search warrant was admitted, but wherein evidence *aliunde* the illegally seized evidence was sufficient to warrant a finding of guilt, was the petitioner deprived of due process under the Fourteenth Amendment?

ARGUMENT

The State of Connecticut does not challenge the accuracy of the matters set forth in the first six pages of Petitioner's brief, except the question presented on page 3. As to all other matters within those pages, the State will not incorporate same in its brief.

The Record p. 1 discloses that the Petitioner felt that his defense was that the acts he committed did not fall within the provisions of the Statute, Section 53-45 of the Connecticut General Statutes, 1958 Revision, as amended by Public Act 437 (1959) entitled, "Injury to Public Buildings, Furniture Or Voting Booths," on the grounds that his acts did not constitute an injury to a public building.

No motion to suppress any evidence was filed and the only challenge offered was in the form of a Demurrer to the Information. R. pp. 1 and 2.

Upon his Demurrer being overruled, he went to trial and upon conviction filed a Motion in Arrest of Judgment and again advanced the argument that the offense charged in the Information does not constitute an injury to public property and, therefore, does not constitute a violation of the statute.

It is significant that no claim is advanced that any illegally seized evidence was introduced in violation of his constitutional rights. He based his defense solely upon a claimed deficiency in the Information as commented upon above.

Even in the Request for Finding, R. p. 10, filed October 1, 1960, the Petitioner made no request that the Court find that the illegally seized evidence was not admissible and should have been excluded, but only requested a finding that the Court erred in precluding the Petitioner from establishing that the police officers searched the premises without a warrant in violation of the Fifth Amendment.

It was not until the *Mapp* decision (June 1961) that the Petitioner switched to the grounds upon which he is now proceeding and using Mapp as his authority.

The State concedes, as it must, that at the time the can of paint and the paint brush was taken by the police officer from the automobile which was standing unoccupied in the garage beneath the Petitioner's residence that he had neither a search warrant nor an arrest warrant and that, therefore, under the *Mapp* case such evidence is now inadmissible even though at the time of the trial and conviction in June of 1960, it was admissible in a state trial because Connecticut had never adopted the exclusionary rule. It has never been denied that the Petitioner was stopped while operating his motor vehicle during the early morning hours of the day in question and within a very short distance of the location where the crime was committed. See R. pp. 11 and 12, especially paragraph 15 wherein it was specifically found that the Petitioner admitted, along with his associate, that they were the ones who had painted the swastikas on the synagogue.

Not only is the other evidence exclusive of the illegally admitted evidence damaging against the Petitioner—especially significant is the fact that he never seriously challenged the right of the State to introduce the evidence

in question but relied upon an entirely different ground for lack of jurisdiction as set forth in his Demurrer and his motion to set aside the judgment.

Therefore, as the Record shows and as the decision of the Supreme Court of Errors of the State of Connecticut states, after that court had made a thorough examination of the transcript of the evidence that there was ample evidence *aliunde* the illegally seized evidence of the can of paint and the paint brush to warrant a finding of guilty. See R. p. 22 wherein appears the following taken from Chief Justice Baldwin's unanimous opinion:

> "The defendants do not claim, nor, as the transcript shows, could they claim, that the illegal search and seizure induced their admissions or confessions. • • • In other words, their claim is that the state, in order to prove that a crime had been committed, had to rely solely on the admission in evidence of the paint jar and the brush. The answer to that claim is that there was ample evidence besides the defendants' confessions and the jar of paint and the brush to prove that swastikas had been painted on the synagogue between the hours of 4 and 5 o'clock on the morning of February 1, 1960. This was sufficient to establish that the crime charged had been committed by someone. The confessions were not inadmissible on the ground claimed, and no other ground of inadmissibility is advanced."

It is the claim of the State that the illegally seized evidence, if anything was cumulative in nature and not the primary evidence upon which the Court without a jury issued a finding of guilty.

This is not a case wherein the dwelling of a citizen, as such, was invaded. The automobile from which the can of paint and the brush was taken was standing in a garage located beneath the house and the garage and automobile were unoccupied at the time. There was no taking of articles from anyone's person and there was no violence nor abuse involved.

Conclusion

Therefore, as the Record shows and as the Finding of the Court and the decision of the Supreme Court of Errors of Connecticut substantiates, there was ample evidence, exclusive of the illegally seized evidence upon which to base a finding of guilty, and the State, therefore, respectfully requests that that finding of guilty be affirmed by this Honorable Court.

OTTO J. SAUR
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